

CHAPTER 2

THE LAW OF WAR

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of Defense Instruction 5000.2, Operation of the Defense Acquisition System, 23 October 2000.
16. Dep't of Defense Directive 5100.77, DoD Law of War Program, 9 December 1998.
17. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 27 August 1999.

INTRODUCTION

This Chapter will describe in detail the restrictions placed upon military members and commanders in the conduct of operations in both international and non-international armed conflicts. This chapter will discuss the purposes and basic

principles of the Law of War, its application in armed conflict, the legal sources of the law, the conduct of hostilities, treatment of protected persons, military occupation of enemy territory, neutrality, and compliance and enforcement measures. The Appendices to this chapter include a Law of War Teaching Outline and a Troop Information Outline.

PURPOSES AND BASIC PRINCIPLES OF THE LAW OF WAR

The fundamental purposes of the law of war are both humanitarian and functional in nature. The humanitarian purposes include:

1. protecting both combatants and noncombatants from unnecessary suffering;
2. safeguarding the fundamental human rights of persons who fall into the hands of armed belligerents; and
3. facilitating the restoration of peace.

The functional purposes include:

1. preventing the deterioration of good order and discipline in the unit;
2. maintaining the humanity of the soldiers involved in the conflict; and
3. maintaining the support of the public for the conflict.

To further the above ends, the Law of War rests on four basic principles:

Principle of Military Necessity or Military Objective - This principle states that attacks may be made only against those targets which are valid military objectives. The definition of military objective is found in Article 52(2) of Protocol I: *Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*

Examples of enemy military objectives which by their nature make an effective contribution to the military action: combatants, armored fighting vehicles, weapons, fortifications, combat aircraft and helicopters, supply depots of ammunition and petroleum, etc.

Examples of enemy military objectives which by their location make an effective contribution to the military action: A narrow mountain pass through which the enemy formation must pass, bridge over which the enemy's main supply route (MSR) crosses, a key road intersection through which the enemy's reserve will pass, etc.

Examples of enemy military objectives which by their purpose make an effective contribution to the military action: Civilian buses or trucks which are being transported to the front to move soldiers from point A to B, a factory which is producing ball bearings for the military. The criterion of purpose is concerned with the intended future use of an object.

Examples of enemy military objectives which by their use make an effective contribution to the military action: An enemy headquarters located in a school, an enemy supply dump located in a residence, a hotel which is used as billets for enemy troops. The criterion of use is concerned with the present function of the object.

Criminal Defense. Military necessity has been urged as a defense to law of war violations, but generally has been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. Look to whether international law allows targeting of a person or property:

Protected Persons. The law of war generally prohibits the intentional targeting of protected persons under any circumstances.

Protected Places - The Rendulic Rule. The law of war typically allows destruction of civilian property if military circumstances necessitate such destruction. (FM 27-10, para. 56 and 58.) The circumstances justifying destruction of protected property are those of “urgent military necessity” as they appear to the commander at the time of the decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). The Tribunal dismissed charges that General Lothar Rendulic unlawfully destroyed civilian property via a “scorched earth” policy because “the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.” Current norms for protection (and destruction) of civilian property: Do not destroy real or personal property of civilians “except where such destruction is rendered absolutely necessary by military operations. (GC, art. 53.) It is “forbidden . . . to destroy or seize the enemy’s property . . . unless demanded by the necessities of war.” (HR, art. 23g.)

There may be situations where because of poor intelligence or the failure of the enemy to abide by the law of war, mistakes are made concerning the status of a site: Example: Al Firdus Bunker. During the Persian Gulf War, planners identified this bunker as a military objective. Barbed wire surrounded the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by coalition planners, the commander made a reasonable assessment that the target was a military. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained—had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. See DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-16 (1992).

Principle of Unnecessary Suffering or Humanity - “It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering.” (HR, art. 23e.) This concept also extends to unnecessary destruction of property. Combatants may not use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregularly shaped bullets, dum-dum rounds, lances with barbed heads), and may not use otherwise lawful arms in a manner that causes unnecessary suffering; for example, with the intent to cause unnecessary suffering.

Principle of Proportionality - The anticipated loss of life and damage to property incidental to attacks must not be **excessive** in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.)

Protocol I. Under GP I, Article 51 (*Protection of the civilian population*), paragraph 5(b) prohibits “indiscriminate attacks,” defined in part as an attack where incidental injury to civilians or incidental damage to civilian objects would be “excessive in relation to the concrete and direct military advantage anticipated.” Under GP I, Article 57 (*Precautions in the attack*), paragraph (2)(b) requires planners to cancel an attack in the same circumstances. The U.S. considers these provisions customary international law.

Example: During Operation Allied Force, Serbian civilians painted red targets on themselves and congregated on key bridges over the Danube River. These bridges were military objectives because they enabled the Serbs to quickly transfer military forces. The Commander making the targeting decision had to balance the concrete and direct military advantage gained by destruction of the bridge against the anticipated number of civilian deaths resulting from the attack.

Incidental Injury and Collateral Damage. Collateral damage consists of unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, GP I, Article 51(5) describes indiscriminate attacks as those causing “incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated.”

Judging Commanders. It may be a grave breach of GP I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably*. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. (FM 27-10, para. 41.)

In judging a commander's actions one must look at the situation as the commander saw it in light of all circumstances. See A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the “Rendulic Rule,” above. But based on case law and modern applications, the test is not entirely subjective—“reasonableness” implies an objective element as well. In this regard, two questions seem relevant. First, did the commander reasonably gather information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also weigh in the analysis.

Principle of Discrimination or Distinction. This principle requires that combatants be distinguished from non-combatants, and that military objectives be distinguished from protected property or protected places. Parties to a conflict shall direct their operations only against combatants and military objectives. (GP I, Art. 48) GP I prohibits “indiscriminate attacks.” Under Article 51, paragraph 4, these are attacks that: are “not directed against a specific military objective,” (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War); “employ a method or means of combat the effects of which cannot be directed at a specified military objective,” (e.g., might prohibit area bombing in certain populous areas, such as a bombardment “which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village...”)(GP I, art. 51, para. 5(a)); or “employ a method or means of combat the effects of which cannot be limited as required” by the Protocol (e.g., release of dangerous forces (GP I, art. 56) or collateral damage excessive in relation to concrete and direct military advantage (GP I, art. 51, para. 5(b)); and “consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction.”

APPLICATION OF THE LAW OF WAR

The Law of War applies to all cases of declared war or any other armed conflicts that arise between the U.S. and other nations, even if the state of war is not recognized by one of them. FM 27-10, para. 8. It also applies to cases of partial or total occupation. This threshold is codified in common article 2 of the Geneva Conventions. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Desert Storm were clearly international armed conflicts to which the Law of War applied. While the 1977 Protocol I to the 1949 Geneva Conventions has expanded this scope of application to include certain wars of “national liberation,” the U.S. is not a Party to the Protocol and does not recognize this extension of the Law of War.

In peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the Law of War applies to those operations. The issue hinges on whether the peace operations forces undertake a combatant role. It has thus far been the U.S., UN, and NATO opinion that their forces have not become combatants, despite carrying out some offensive-type operations (e.g. Task Force Ranger in Somalia, Operations Deny Flight and Deliberate Force in Bosnia). Despite the legal inapplicability of the Law of War to these operations, it is, nonetheless, the position of the U.S., UN, and NATO that their forces will apply the “principles and spirit” of the Law of War in these operations.

This approach is consistent with DoD policy to comply with the Law of War “in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” (DoD Directive 5100.77, para. 5.3.1) CJCSI 5810.01, para. 5.a. states that the U.S. “will apply law of war principles during all operations that are categorized as Military Operations Other Than War.” In applying the DoD policy, however, allowance must be made for the fact that during these operations U.S. Forces often do not have the resources to comply with the Law of War to the letter. It has been U.S. practice to comply with the Law of War to the extent “practicable and feasible.” Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990.

SOURCES OF THE LAW OF WAR.

The Law of The Hague (ref. (1) and (2)). Regulates “methods and means” of warfare—prohibitions against using certain weapons such as poison; and humanitarian concerns such as warning the civilian population before a bombardment. The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land [hereinafter HR] annexed to Hague Convention IV. (HR, art. 22-41.) Article 22 states that the means of injuring the enemy are not unlimited.

Geneva Conventions of 1949 (ref. (3) - (6)). The Conventions protect “victims” of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.

1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified GP I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the UN). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law. The impetus for drafting the Protocols was the International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII, specifically aerial bombardments, protection of civilians, and wars of national liberation. New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

The U.S. views the following GP I articles as either legally binding as customary international law or acceptable practice though not legally binding: 5 (appointment of protecting powers); 10 (equal protection of wounded, sick, and shipwrecked); 11 (guidelines for medical procedures); 12-34 (medical units, aircraft, ships, missing and dead persons); 35(1)(2) (limiting methods and means of warfare); 37 (perfidy prohibitions); 38 (prohibition against improper use of protected emblems); 45 (prisoner of war presumption for those who participate in the hostilities); 51 (protection of the civilian population, except para. 6 -- reprisals); 52 (general protection of civilian objects); 54 (protection of objects indispensable to the survival of the civilian population); 57-60 (precautions in attack, undefended localities, and demilitarized zones); 62 (civil defense protection); 63 (civil defense in occupied territories); 70 (relief actions); 73-89 (treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).

The U.S. specifically objects to articles: 1(4) (GP I applicability to certain types of armed conflicts - wars of national liberation from "colonial domination," "alien occupation," and "racist regimes"); 35(3) (environmental limitations on means and methods of warfare); 39(2) (limits on the use of enemy flags and insignia); 44 (expansion of definition of combatants, relaxing of requirement to wear fixed distinctive insignia recognizable at a distance; reducing threshold of lawful combatants status to requirement to carry arms openly during military engagement or in military deployment preceding an attack; when visible to an adversary); 47 (non-protection of mercenaries); 55 (protection of the natural environment) and 56 (protection of works and installations containing dangerous forces). See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419, 420 (1987)

Other Treaties. The following treaties restrict specific aspects of warfare:

Gas (ref. (8) and (9)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases U.S. reserved the right to respond with chemical weapons to a chemical attack by the enemy. The Chemical Weapons Convention (CWC), article I(1), prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC in April 1997.

Cultural Property (ref. (10)). The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked. Although the United States has not ratified the treaty, it does regard its provisions as relevant to the targeting process: "United States policy and the conduct of operations are entirely consistent with the Convention's provisions. In large measure, the practices required by the convention to protect cultural property were based upon the practices of US military forces during World War II." Message from the President of the United States transmitting the Hague Protocol to the 106th Congress for Advice and Consent, 6 January 1999.

Biological Weapons (ref. (11)). Biological weapons are prohibited by the 1925 Geneva Protocol. In addition, prohibitions on their use in retaliation, as well as on production, manufacture, and stockpiling, are included in the 1972 Biological Weapons Convention.

Conventional Weapons (ref. (12)). The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I – non-detectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV - laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV and amendments

to Protocol II for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons.

Regulations. Implementing LOW guidance for U.S. Armed Forces is found in respective service regulations. (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps), and AFP AFD 51-4 (Air Force).)

THE CONDUCT OF HOSTILITIES

Lawful Combatants and Unprivileged Belligerents

Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless “out of combat.”

Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS (Sea), and GPW; gain “combatant immunity” for their warlike acts; and become prisoners of war if captured.

Geneva Convention of 1949 Definition. (GPW, art. 4; GWS, art. 13.) Combatants include: armed forces of a Party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of armed forces of a government not recognized by a detaining authority or occupying power.

Protocol I Definition. Article 43 states that members of the armed forces of a party to the conflict, except medical personnel and chaplains, are combatants. Article 44(3) of GP I allows that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of the Law of War.

Unprivileged belligerents. May be treated as criminals under the domestic law of the captor. Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities.

Forbidden Conduct with Respect to Enemy Combatants and Nationals

It is especially forbidden to declare that no quarter will be given, or to kill or injure enemy personnel who have surrendered. H. IV Reg. Art. 23. It is also forbidden to kill or wound treacherously individuals belonging to the hostile nation or armed forces. H. IV Reg. Art. 23. Belligerents are likewise prohibited to compel nationals of the enemy state to take part in hostilities against their own country. H. IV art. 23.

Assassination. Hiring assassins, putting a price on the enemy’s head, and offering rewards for an enemy “dead or alive” is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.

Non-combatants. The law of war prohibits attacks on non-combatants. Among others, non-combatants include civilians, medical personnel, chaplains, and those out of combat – including prisoners of war and the wounded and sick.

METHODS AND MEANS OF WARFARE/WEAPONS

“The rights of belligerents to adopt means of injuring the enemy is not unlimited.” (HR, art. 22.)

Legal Review. All U.S. weapons, weapons systems, and munitions must be reviewed by the service TJAG for legality under the law of war. (DoD Instr. 5000.2, AR 27-53, AFI 51-402 and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Instr. 5000.2) Legal review of new weapons is also required under Article 36 of GP I.

The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Instr. 5000.2, para. 4.7.3.1.4.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use.

Weapons may be illegal:

Per se. Those weapons calculated to cause unnecessary suffering, determined by the “usage of states.” Examples: lances with barbed heads, irregularly shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)

By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering. (The LOW does not mandate the use of guided munitions.)

By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Expanding rounds were prohibited by an 1899 Hague Declaration (of which U.S. was never a party). U.S. practice, however, accedes to this prohibition as being customary international law. State practice is to use full metal-jacketed small arms ammunition (which reduces bullet expansion on impact).

Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international law and the treaties mentioned above. There are situations, however, outside of international armed conflict, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security). “Matchking” ammunition - has a hollow tip—but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

High Velocity Small Caliber Arms. Early controversy about M-16 causing unnecessary suffering due to movement of the high velocity round upon impact. Tests concluded the rounds did not cause unnecessary suffering.

Sniper rifles, .50 caliber machine guns, and shotguns. Much “mythology” exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

Fragmentation. (FM 27-10, para 34.) Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering). Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

Land Mines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty, restrict placement of mines and booby traps in areas of “civilian concentration.”

Remotely delivered mines (those planted by air, artillery, etc.): Only used against military objectives; and then only if their location can be accurately recorded and if they are self-neutralizing or self-destructing.

Non-remotely delivered mines, booby traps, and other devices: May not be used in towns or cities or other places where concentrations of civilians are present unless: they are placed in the vicinity of a military objective under the control of an adverse party; or measures are in place to protect civilians from their effects (posting of signs etc.).

Booby Traps: Amended Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects, among other objects (art. 6).

Amended Protocol II (Mines Protocol). The Senate gave its advice and consent to ratification of Amended Protocol II and the President subsequently signed the instrument of ratification in May 1999. Amended Protocol II:

- (1) Expands the scope of the original Protocol to include internal armed conflicts;
- (2) Requires that all remotely delivered anti-personnel land mines (APL) be equipped with self-destruct devices and backup self-deactivation features;
- (3) Requires that all non-remotely delivered APL not equipped with such devices ("dumb mines") be used within controlled, marked, and monitored minefields (Falls short of President's APL policy statement of 16 May 1996 that prohibited U.S. military use of "dumb" APL except on the Korean Peninsula and in training);
- (4) Requires that all APL be detectable using available technology;
- (5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use; and
- (6) Provides for means to enforce compliance. In his letter of Transmittal, the President emphasized his continued commitment to the elimination of all APL.

U.S. policy on anti-personnel land mines. U.S. forces may no longer employ APL that do not self-destruct or self-neutralize, (sometimes called "dumb" anti-personnel land mines) according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy: the use of non-self-destructing APL on the Korean Peninsula and for training purposes. *See Antipersonnel Land Mines Law and Policy, Army Lawyer*, Dec. 1998, at 22; *see generally* Presidential Decision Directive 48 (on file with the Chairman, Joint Chiefs of Staff, Legal Counsel).

Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGOs met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. The Convention was signed in Ottawa, Canada in December 1997. As of April 1999, 133 nations had signed the convention and 67 had ratified it. The treaty entered into force on 1 March 1999. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of self-destructing/self neutralizing APL.

U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:

Develop alternatives to APL by the year 2003; field them in South Korea by 2006.

Appointed a Presidential advisor on land mines.

Pursue a ban on APL through the UN Conference on Disarmament.

Increase demining programs.

APL moratorium. Section 580 of the Foreign Operations Authorization Act of 1996 (110 Stat. 751) was to establish a moratorium on the use of antipersonnel land mines for one year beginning 12 February 1999. Section 1236 of the FY 99 DoD Authorization Act repealed Section 580: no moratorium will take place.

Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering."

Napalm and Flame-throwers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.

Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The U.S. is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

Lasers. U.S. Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental damage may occur as the result of legitimate military use of lasers (range-finding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by U.S.). The Senate is reviewing the Protocol for its advice and consent to ratification.

Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem—once unleashed it is hard to control. (HR, art. 23a.)

The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of “asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . .” The U.S. considers the 1925 Geneva Protocol as applying to both lethal and incapacitating chemical agents. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a “transient” effect—and thus are NOT incapacitating agents. Therefore, the treaty does not prohibit their use in war. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below. Under the Geneva Protocol of 1925 the U.S. reserved right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) **HOWEVER THE U.S. RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS “SECOND” USE.** Riot Control Agents: U.S. has an understanding to the Treaty that these are not prohibited.

Riot Control Agents (RCA). U.S. RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires presidential approval before first use in an armed conflict.

EO 11850: renounces first use in armed conflicts except in defensive military modes to save lives such as: controlling riots in areas under direct and distinct U.S. military control, to include rioting prisoners of war; dispersing civilians where the enemy uses them to mask or screen an attack; rescue missions for downed pilots/passengers and escaping PWs in remotely isolated areas; and in our rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)

1993 Chemical Weapons Convention (CWC) (ref. 9). The CWC was ratified by U.S. and came into force in April 1997.

Provisions (twenty-four articles). Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a “method of warfare.” Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention. Article III. Requires parties to declare stocks of chemical weapons and facilities they possess. Articles IV and V. Procedures for destruction and verification, including routine on-site inspections. Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC). Article IX. Establishes “challenge inspection,” a short notice inspection in response to another party’s allegation of non-compliance.

RCA Controversy. The Chemical Weapons Convention prohibits RCA use as “method of warfare.” “Method of warfare” is undefined, however some argue the phrase includes any actions that involve “combatants” - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by EO 11850. The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. (However, any use in which “combatants” may be involved will most likely not be approved.) The Senate’s resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, S-3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against “combatants” in any of the following cases: when the U.S. is not a party to the conflict, in consensual (Chapter VI, UN Charter) peacekeeping operations, and in Chapter VII (UN Charter) peacekeeping operations.

The implementation section of the resolution requires that the President not modify E.O. 11850. (See S. Exec Res. 75, section 2 (26)(b), S-3378). The President’s certification document of 25 April 1997 states that “the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.” Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda, and Haiti) it appears U.S. policy will maintain that we are not a party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA will approve the use of RCA in situations where “combatants” are involved due to the CWC’s prohibition on the use of RCA as a “method of warfare.” (Opinion: use of RCA would be unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850, if the RCA use would appear to be a “method of warfare.”)

Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)

Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.

Nuclear Weapons. (FM 27-10, para. 35.) Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that “There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.” However, by a split vote, the ICJ also found that “The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.” The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996).)

BOMBARDMENTS, ASSAULTS, AND PROTECTED AREAS AND PROPERTY

Military Objectives. Objects that, by their nature, use, location, or purpose, make an effective contribution to military action are legitimate military objectives. (FM 27-10, para. 40, GP I, art. 52(2).) Their destruction, capture or neutralization is justified if it offers a definite military advantage. There must be a nexus between the object and a

“definite” advantage toward military operations. Examples: enemy equipment, munitions factories, roads, bridges, railroads, or electrical powers stations.

Warning Requirement. (FM 27-10, para. 43.; see HR, art. 26.) General requirement to warn before a bombardment. Only applies if civilians are present. **Exception:** if it is an assault (any surprise attack or an attack where surprise is a key element). GP I, Article 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the U.S.).

Defended Places. (FM 27-10, paras. 39 & 40, change 1.) As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include: a fort or fortified place; a place occupied by a combatant force or through which a force is passing; and a city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. See also, GP I, Article 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments that treat “as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village. . . .”

Undefended places. The attack or bombardment of towns, villages, dwellings, or buildings, which are undefended, is prohibited. (HR, art. 25.) An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

All combatants and mobile military equipment are removed;

No hostile use made of fixed military installations or establishments;

No acts of hostilities shall be committed by the authorities or by the population; and

No activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed). (FM 27-10, art. 39b, change 1.)

To gain protection as an undefended place, the city must be open to occupation by the adverse party.

(GP I, art. 59)

Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against “long-term, widespread, and severe damage.” (GP I, art. 55 - U.S. specifically objects to this article, as the terminology is so vague as to be ineffective.)

Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (FM 27-10, para. 45.) Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an “International Register of Cultural Property under Special Protections.” The Vatican and art storage areas in Europe have been designated under the convention as “specially protected.” The U.S. asserts that the Hague Cultural Property Convention special protection regime does not reflect customary international law.

Protected Property.

Civilians. Prohibition against attacking civilians or civilian property. (FM 27-10, para. 246; GP I, art. 51(2).) Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, art. 52(3)), as contrasted with military objectives such as industrial facilities such as munitions factories, which remain legitimate military objectives even if manned by civilian workers.

Protection of Medical Units and Establishments - Hospitals. (FM 27-10, paras. 257 and 258; GWS art. 19). Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked. Protection shall not cease, unless they are used to commit “acts harmful to the enemy.” Warning requirement before attacking a hospital in which individuals are committing “acts harmful to the enemy.” The hospital is given a reasonable time to comply with warning before attack. When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.

Captured Medical Facilities and Supplies of the Armed Forces. (FM 27-10, para. 234). Fixed facilities - May be used by captors for other than medical care, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present. Mobile facilities - Captors may keep mobile medical facilities, provided they are reserved for care of the wounded and sick. Medical Supplies - May not be destroyed.

Medical Transport. Transports of the wounded and sick or medical equipment shall not be attacked. (GWS, art. 35.) Under the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. GP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exists. (GP I, art. 25.) In “contact zones,” protection can only be effected by prior agreement; nevertheless, medical aircraft “shall be respected after they have been recognized as such.” (GP I, art. 26 - considered customary international law by U.S.) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection. (GP I, art. 27.)

Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties (HR, art. 27; FM 27-10, para. 45, 57.) The convention has not been ratified by the U.S. (treaty is currently under review with a view toward ratification with minor understandings). (See GP I, art. 53, for similar prohibitions.) Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected. Misuse will subject them to attack. Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

Works and Installations Containing Dangerous Forces. (GP I, art. 56, and GP II, art. 15.) The rules are not U.S. law but should be considered because of the pervasive international acceptance of GP I and II. Under the Protocol, dams, dikes, and nuclear electrical generating stations shall not be attacked - even if they are military objectives - if the attack will cause the release of dangerous forces and cause “severe losses” among the civilian population. (U.S. objects to “severe loss” language as creating a different standard than customary proportionality test - “excessive” incidental injury or damage.) Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations). May attack works and installations containing dangerous forces only if they provide “significant and direct support” to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes “an effective contribution to military action.” Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.

Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population - such as foodstuffs, crops, livestock, water installations, and irrigation works.

Protective Emblems. (FM 27-10, para. 238.) Objects and personnel displaying emblems are presumed to be protected under Conventions. (GWS, art. 38.)

Medical and Religious Emblems. Red Cross, Red Crescent, Lion and Sun. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.

Cultural Property Emblems:

“A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle.” (1954 Cultural Property Convention, art. 16 and 17).

Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). “[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.”

Works and Installations Containing Dangerous Forces. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius. (GP I, annex I, art. 16.)

Stratagems and Tactics

Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war—actions are in good faith). Examples of ruses:

Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels.

Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. (FM 27-10, para. 51.)

Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the “left hook” strategy actually implemented. XVIII Airborne Corps set up “Forward Operating Base Weasel” near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape-recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *Crusade*, 331-33 (1993).

Use of Enemy Property. Enemy property may be used to deceive under the following conditions:

Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their own uniform lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.) For listing of examples of the use of enemy uniforms, see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990).

Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the U.S. interprets the “improper use” of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5.). Note the Protocol I position on this issue below.

Equipment. Must remove all enemy insignia in order to fight with it. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53).

Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (See NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or “to shield, favour, protect or impede military operations.” The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)

Use of Property. (See Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

Psychological Operations. Gulf War - U.S. PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the “futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein.” It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets

affected their decision to surrender. Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith). Perfidy degrades the protections and mutual restraints developed in the interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. (FM 27-10, para. 50.)

Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. According to GP I, Article 37(1), the killing, wounding, or capture via “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts].” (U.S. considers customary law.) Article 37(1) does not prohibit perfidy *per se*, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. Note, however, that the U.S. view includes breaches of moral, as well as legal, obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.) Note that in order to be a violation of GP I, Article 37, the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. (HR, art 23(f))

Feigning incapacitation by wounds/sickness. (GPI, art. 37(1)(b).)

Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)

Feigning civilian, noncombatant status. “Attacking enemy forces while posing as a civilian puts all civilians at hazard.” (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)

Feigning protected status by using UN, neutral, or nations not party to the conflict’s signs, emblems, or uniforms. (GP I, art 37(1)(d).)

Misuse of Red Cross, Red Crescent, and cultural property symbol. Designed to reinforce/reaffirm HR, Article 23f. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, and 1907 Hague Conventions symbol.

Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage. Espionage is not a law of war violation. No protection, however, under Geneva Conventions for acts of espionage. If captured, a spy may be tried under the laws of the capturing nation. E.g., Art. 106, UCMJ. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, the alleged “spy” cannot be tried for past espionage.

Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war. Reprisals are authorized if the following requirements are met: it’s timely; it’s responsive to enemy’s act; must first attempt a lesser form of redress; and must be proportional. Prisoners of war and other protected persons “in your control” cannot be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56). The U.S. position is that reprisals are prohibited only when directed against protected persons as defined in the Geneva Conventions. U.S. policy is that a reprisal may be ordered only at the highest levels (NCA).

War Trophies. The law of war authorizes the confiscation of enemy military property. War trophies, as long as taken from enemy military property, are legal under the law of war. The problem with war trophies arises under U.S. domestic law, rather than under the law of war. Confiscated enemy military property is property of the U.S. The property becomes a war trophy—and capable of legal retention by an individual soldier—only if the U.S. so designates the property IAW law and regulation.

War Trophy Policy. Section 1171 of the 1994 National Defense Authorization Act states the U.S. policy on war trophies. In essence, the law amends Title 10 by adding section 2579; 10 U.S.C. § 2579 requires that all enemy material captured or found abandoned shall be turned in to “appropriate” personnel. The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request “consistent with military customs, traditions, and regulations.” The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD and the Bureau of Alcohol, Tobacco, and Firearms (BATF). Ample flexibility (or ambiguity) is created by the law so as to continue the need for punitive command policies or regulations which limit the items that may properly be taken as war trophies. (AR 190-XX, Control and Requisition of War Trophies, will implement the law; as of this writing, the regulation is still in draft.) USCENTCOM General Order Number 1 is perhaps the classic example of a war trophy order. These regulations and policies, and relevant UCMJ provisions must be made known to U.S. forces prior to combat. War trophy regulations must be emphasized early and often, for even those who are aware of the regulations may be tempted to disregard them if they see others doing so.

The key to a clear and workable war trophy policy is to publicize it before deployment, work it into all exercises and plans, and train with it! When drafting a war trophy policy, consider the “6 Cs”:

1. COMMON SENSE—does the policy make sense?
2. CLARITY—can it be understood at the lowest level?
3. CI—is the word out through all command information means available? (Post on unit bulletin boards, post in mess facilities, put in post newspaper, put in PSA on radio, etc.)
4. CONSISTENCY—are we applying the policy across all layers and levels of command? (A policy promulgated for an entire Corps is better than diverse policies within subordinate divisions; a policy that is promulgated by the unified command and applies to all of its components is better still.)
5. CUSTOMS—prepare for customs inspections, “courtesy” inspections prior to redeployment, and amnesty procedures.
6. CAUTION—Remember one of the prime purposes of a war trophy policy: to limit soldiers from exposing themselves to danger (in both Panama and the Gulf, soldiers were killed or seriously injured by exploding ordnance encountered when they were looking for souvenirs). Consider prohibitions on unauthorized “bunkering,” “souvenir hunting,” “climbing in or on enemy vehicles and equipment.” A good maxim for areas where unexploded ordnance or booby-traps are problems: “If you didn’t drop it, don’t pick it up.”

Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue engagement with other forces. ROE are drafted in consideration of the Law of War, national policy, public opinion, and military operational constraints. ROE are often more restrictive than what the Law of War would allow.

PROTECTED PERSONS

Hors de Combat. Prohibition against attacking enemy personnel who are “out of combat.”

Prisoners of War. (GPW, art. 4, HR, art. 23c, d.)

Surrender may be made by any means that communicates the intent to give up. No clear-cut rule as to what constitutes a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor. The onus is on the person or force surrendering to communicate intent to surrender. Captors must respect (not attack) and protect (care for) those who surrender—no reprisals. GP I art. 44 expands the definition of prisoners of war to include any combatant "who falls into the power of an adverse Party" Combatants include those who do not distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts this definition does not reflect customary international law. Captured civilians accompanying the force also receive PW status (GPW, art. 4(a)(4)).

Identification and Status. The initial combat phase will likely result in the capture of a wide array of individuals.¹ The U.S. applies a broad interpretation to the term "international armed conflict" set forth in common Article 2 of the Conventions. Furthermore, DoD Directive 5100.77, the DoD Law of War Program, states that U.S. Forces will comply with the LOW regardless of how the conflict is characterized. Judge advocates, therefore, should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined. In that regard, recall that "status" is a legal term, while "treatment" is descriptive. When drafting or reviewing guidance to soldiers, ensure that the guidance mandates treatment, not status. For example, a TACSOP should state that persons who have fallen into the power of U.S. Forces will be "treated as PW," not that such persons "will have the status of PW." When doubt exists as to whether captured enemy personnel warrant continued PW status, Art. 5 (GPW) Tribunals must be convened. It is important that judge advocates be prepared for such tribunals. During the Vietnam conflict, a Directive established procedures for the conduct of Art. 5 Tribunals; however, no comparable Directive is presently in effect.²

Treatment. There is a legal obligation to provide adequate food, facilities, and medical aid to all PWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, judge advocates must be aware of how to meet this obligation while placing a minimum burden on operational assets.³ PWs must be protected from physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, PWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by the GPW. In no event can a PW's rank insignia or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

Detainees. Particularly in Military Operations Other Than War, where there are no lawful enemy combatants (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts and are captured do not meet the legal criteria of PW under the GPW. These persons may be termed "detainees" instead of PW.

¹ For example, in two days of fighting in Grenada, Army forces captured approximately 450 Cubans and 500 hostile Grenadians. Panama provided large numbers of detainees, both civilian and "PDF" (Panamanian Defense Force/police force) for the Army to sort out. The surrender of almost overwhelming numbers of Iraqi forces in the Gulf War was well publicized.

² No Article 5 Tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation DESERT STORM netted a large number of persons thought to be EPWs, who were actually displaced civilians. Subsequent interrogations determined that they had taken no hostile action against Coalition Forces. In some cases, they had surrendered to Coalition Forces to receive food and water. Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to detainment camps. Whether the tribunals were necessary as a matter of law is open to debate -- the civilians had not "committed a belligerent act," nor was their status "in doubt."

³ The following examples are illustrative. When U.S. Forces landed in Grenada, they did not possess the food necessary to feed the large number of PWs and detainees who would come under our control. Thus, we used captured foodstuffs to feed them. Similar situations occurred in Panama. Thus, by using captured food, the U.S. met its obligation under the GPW, and the ground commanders were able to conserve valuable assets. Initially, PW facilities on Grenada, in Panama, and in the Gulf were each inadequate in their own ways. They consisted of dilapidated buildings, with no sanitation facilities or electricity, or were simply non-existent (in the desert). The ground commanders could not afford to use critically needed combat personnel (the personnel necessary to handle PWs were not initially available) to construct PW camps. Because the LOW does not require combatants to use their own assets to construct PW camps, the U.S. used captured property and PWs to construct adequate camps. (In fact, in Grenada the PWs were Cuban construction workers.). Medical assets also tend to be in high demand and short supply during combat. The LOW, however, prohibits the willful denial of needed medical assistance to PWs, and priority of treatment must be based on medical reasons. While the Capturing Party has the obligation to ensure adequate medical care for enemy wounded, the GWS Convention encourages the use of "retained persons" to treat enemy wounded. The U.S. has made use of this provision as well. As these examples indicate, the JA must be familiar with and apply the LOW in a practical manner. In doing so, he enables the commander to comply with legal requirements, without jeopardizing the mission.

Wounded and Sick in the Field and at Sea. (GWS, art. 12; GWS Sea, art. 12.)

The first and second Geneva Conventions as well as the 1977 Protocol I to the Geneva Conventions deal with protections for the wounded and sick, to include the shipwrecked.

All wounded and sick in the hands of the enemy must be respected and protected (*See* para. 208, FM 27-10, GWS Art 13, and GC, Art 16). “Each belligerent must treat his fallen adversaries as he would the wounded of his own army” (Pictet’s Commentary, GWS, p. 137). The order of treatment is determined solely by urgent medical reasons (triage). No adverse distinctions in treatment may be established because of sex, race, nationality, religion, political opinions, or any other similar criteria (GWS, Art 12).

If compelled to abandon the wounded and sick to the enemy, commanders must leave medical personnel and material to assist in their care, “as far as military considerations permit” (GWS, Art 12). At all times, and particularly after an engagement parties are obligated to search for the wounded and sick - as conditions permit (GWS, Art 15).

Permanent medical personnel “exclusively engaged” in medical duties (GWS, Art 24), chaplains (GWS, Art 24), personnel of national Red Cross Societies, and other recognized relief organizations (GWS, Art 26), shall not be intentionally attacked. Upon capture they are “retained personnel,” not PWs; however, at a minimum they receive PW protections. They are to perform only medical or religious duties. They are to be retained as long as required to treat the health and spiritual needs of PWs. If not required they are to be repatriated (GWS, Art 28). Personnel of aid societies of neutral countries cannot be retained, and must be returned as soon as possible.

Medical units and establishments may not be attacked. (GWS, Art 19). However, incidental damage to medical facilities situated near military objectives is not a violation of the law of war. Medical units and facilities lose their protection if committing “acts harmful to the enemy,” and, if after a reasonable time, they fail to heed a warning to desist. No warning requirement if taking fire from the medical unit or establishment; e.g., Richmond Hills Hospital, Grenada (GWS, Art 21, Pictet’s Commentary on GWS, pp. 200-201).

Those soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected. Under GP I, civilians are included in the definition of wounded and sick (who because of trauma, disease, . . . are in need of medical assistance and care and who refrain from any act of hostility). (GP I, art. 8.) As a practical matter, care should be provided to civilians if medical resources are available. Otherwise, civilian care remains the primary responsibility of the civilian authorities.

Shipwrecked members of the armed forces at sea are to be respected and protected. (GWS Sea, art. 12, NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers/crews on aircraft, ships in peril, castaways.

Parachutists (FM 27-10, *supra*, para. 30). Descending paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists are crewmen of a disabled aircraft. They are presumed to be out of combat and may not be targeted unless it is apparent they are engaged on a hostile mission. Parachutists, according to GP I, Article 42, “shall be given the opportunity to surrender before being made the object of attack.”

Civilians.

General Rule. Civilians and civilian property may not be the subject or sole object of a military attack. Civilians are persons who are not members of the enemy’s armed forces, and who do not take part in the hostilities (GP I, art. 50 and 51).

Indiscriminate Attacks. GP I provides for expanded protections of the civilian population from “indiscriminate” attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. (GP I, art. 51(4).)

Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and

the Protocols concerning the protection and identification of medical personnel. All available help shall be given to civilian medical personnel when civilian services are disrupted due to combat.

Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the Convention provide for specific positions as cultural protectors and for their identification.

Journalists. Given protection as “civilians” provided they take no action adversely affecting their status as civilians. (GP I, art. 79 -considered customary international law by U.S.).

MILITARY OCCUPATION

The Nature of Military Occupation

Territory is considered occupied when it is actually placed under the authority of the hostile armed forces. The occupation extends only to territory where such authority has been established and can effectively be exercised. H. IV Regs. Art. 42. Thus, occupation is a question of fact based on the invader's ability to render the invaded government incapable of exercising public authority. Simply put, occupation must be both actual and effective. (FM 27-10, para. 352) However, military occupation (also termed belligerent occupation) is not conquest; it does not involve a transfer of sovereignty to the occupying force. Indeed, it is unlawful for a belligerent occupant to annex occupied territory or to create a new state therein while hostilities are still in progress. See GC, art. 47. It is also forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile occupying power. H. IV. Regs. Art. 45. Occupation is thus provisional in nature, and is terminated if the occupying power is driven out.

Administration of Occupied Territory

Occupied territory is administered by military government, due to the inability of the legitimate government to exercise its functions, or the undesirability of allowing it to do so. The occupying power therefore bears a legal duty to restore and maintain public order and safety, while respecting, "unless absolutely prevented," the laws of the occupied nation. H. IV. Regs Art. 43. The occupying power may allow the local authorities to exercise some or all of their normal governmental functions, subject to the paramount authority of the occupant. The source of the occupant's authority is its imposition of government by force, and the legality of its actions is determined by the Law of War.

In restoring public order and safety, the occupant is required to continue in force the normal civil and criminal laws of the occupied nation, unless they would jeopardize the security of the occupying force or create obstacles to application of the GC. See GC Art. 64. However, the military and civilian personnel of the occupying power remain immune from the jurisdiction of local law enforcement.

Articles 46-63 of the GC establish important fundamental protections and benefits for the civilian population in occupied territory. Family honor, life and property, and religious convictions must be respected. Individual or mass forcible deportations of protected persons from the occupied territory to the territory of the occupying power or to a third state are prohibited. GC Art. 49. The occupying power has the duty of ensuring that the population is provided with adequate food, medical supplies and treatment facilities, hygiene, and public health measures. GC Art. 55. In addition, children are subject to special protection and care, particularly with respect to their education, food, medical care, and protection against the effects of war. GC Art. 50.

The occupying power is forbidden from destroying or seizing enemy property unless such action is "imperatively demanded by the necessities of war," H. IV. Regs. Art. 23, or "rendered absolutely necessary by military operations." GC Art. 53. "Pillage is formally forbidden." H. IV. Regs. Art. 47. However, the occupying power may requisition goods and services from the local populace to sustain the needs of the occupying force, "in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country." The occupying power is obliged to pay cash for such requisitions or provide a receipt and make payment as soon as possible. H. IV. Regs. Art. 52.

The occupying power may not compel protected persons to serve in its armed forces, nor may it compel them to work unless they are over eighteen years old, and then only on work that: (1) is necessary for the needs of the occupying force; (2) is necessary for public utility services; or (3) for the feeding, sheltering, clothing, transportation or health of the populace of the occupied country. The occupied country's labor laws regarding such matters as wages, hours, and compensation for occupational accidents and diseases remain applicable to the protected persons assigned to work by the occupant. GC Art. 51; *see* H. IV. Regs. Art. 23.

The occupying power is specifically prohibited from forcing the inhabitants to take part in military operations against their own country, and this precludes requiring their services in work directly promoting the military efforts of the occupying force, such as construction of fortifications, entrenchments, and military airfields. See GC Art. 51. However, the inhabitants may be employed voluntarily in such activities.

Security of the Occupying Force: Penal Law and Procedure

The occupant is authorized to demand and enforce the populace's obedience as necessary for the security of the occupying forces, the maintenance of law and order, and the proper administration of the country. The inhabitants are obliged to behave peaceably and take no part in hostilities.

If the occupant considers it necessary, as a matter of imperative security needs, it may assign protected persons to specific residences or internment camps. GC Art. 78. The occupying power may also enact penal law provisions, but these may not come into force until they have been published and otherwise brought to the knowledge of the inhabitants in their own language. Penal provisions shall not have retroactive effect. GC Art. 65.

The occupying power's tribunals may not impose sentences for violation of penal laws until after a regular trial. The accused person must be informed in writing in his own language of the charges against him, and is entitled to the assistance of counsel at trial, to present evidence and call witnesses, and to be assisted by an interpreter. The occupying power shall notify the protecting power of all penal proceedings it institutes in occupied territory. Sentences shall be proportionate to the offense committed. The accused, if convicted, shall have a right to appeal under the provisions of the tribunal's procedures or, if no appeal is provided for, he is entitled to petition against his conviction and sentence to the competent authority of the occupying power. GC, Arts. 72, 73.

Under the provisions of the GC, the occupying power may impose the death penalty on a protected person only if found guilty of espionage or serious acts of sabotage directed against the occupying power, or of intentional offenses causing the death of one or more persons, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began. GC Art. 68. However, the United States has reserved the right to impose the death penalty for such offenses resulting in homicide irrespective of whether such offenses were previously capital offenses under the law of the occupied state. In any case, the death penalty may not be imposed by the occupying power on any protected person who was under the age of eighteen years at the time of the offense. GC Art. 68.

The occupying power must promptly notify the protecting power of any sentence of death or imprisonment for two years or more, and no death sentence may be carried out until at least six months after such notification. GC Arts. 74, 75.

The occupying power is prohibited from imposing mass punishments on the populace for the offenses of individuals. That is, "No general penalty, pecuniary or otherwise, shall be inflicted upon the populations on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." H. IV. Regs Art. 50; see GC, Art. 33.

In areas occupied by United States forces, military jurisdiction over individuals, other than members of the U.S. armed forces, is exercised by courts of the military government. Although sometimes designated by other names, these military tribunals are actually military commissions. They preside in and for the occupied territory and thus exercise their jurisdiction on a territorial basis.

NEUTRALITY

Customary Law Reflected in Hague Convention No. V

Under customary international law, as reflected in Hague Convention No. V, neutrality on the part of a state not a party to an armed conflict consists in refraining from all participation in the conflict, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. In response, it is the duty of the belligerents to respect the territory and rights of neutral states. Those neutrality rights include the following:

The territory of the neutral state is inviolable. H. V. Art. 1. This prohibits any unauthorized entry into the territory of the neutral state, its territorial waters, or the airspace over such areas by troops or instrumentalities of war. Thus, belligerents are also specifically prohibited from moving troops or convoys of war munitions or supplies across the territory of a neutral state. H. V. Art. 2. In consequence, the efforts of the neutral to resist, even by force, attempts to violate its territory cannot be regarded as hostile acts by the offending belligerents. H. V. Art. 10. However, if the neutral is unable, or fails to prevent such violations of its neutrality by the troops of one belligerent, that belligerent's enemy may be justified in attacking those troops in neutral territory.

Belligerents are also prohibited from establishing radio communications stations in neutral territory to communicate with their armed forces, or from using such facilities previously established before the outbreak of hostilities for that purpose. H. V. Art. 3. However, a neutral state may permit the use of its own communications facilities to transmit messages on behalf of the belligerents, so long as such usage does not lend assistance to the forces of only one side of the conflict. Indeed, the neutral must ensure that the measure it takes in its status as a neutral state are impartial as applied to all belligerents. H.V. Art. 9.

While a neutral state is under no obligation to allow passage of convoys or aircraft carrying the sick and wounded of belligerents through its territory or airspace, it may do so without forfeiting its neutral status. However, the neutral must exercise necessary control or restrictive measures concerning the convoys or medical aircraft, must ensure that neither personnel nor material other than that necessary for the care of the sick and wounded is carried, and must accord the belligerents impartial treatment. H. V. Art. 14; see GWS Art. 37. In particular, if the wounded and sick or prisoners of war are brought into neutral territory by their captor, they must be detained and interned by the neutral state so as to prevent them from taking part in further hostilities. GWS Art. 37.

The nationals of a neutral state are also considered as neutrals. H. V. Art. 16. However, if such neutrals reside in occupied territory during the conflict, they are not entitled to claims different treatment, in general, from that accorded the other inhabitants. They are likewise obliged to refrain from participation in hostilities, and must observe the rules of the occupying power. Moreover, such neutral residents of occupied territory may be punished by the occupying power for penal offenses to the same extent as nationals of the occupied nation. *See* GC Art. 4.

A national of a neutral state forfeits his neutral status if he commits hostile acts against a belligerent, or commits acts in favor of a belligerent, such as enlisting in its armed forces. However, he is not to be more severely treated by the belligerent against whom he has abandoned his neutrality than would be a national of the enemy state for the same acts. H. V. Art. 17.

The United States has supplemented the above-described rules of international law concerning neutrality by enacting federal criminal statutes that define offenses and prescribe penalties for violations against U.S. neutrality. Some of these statutes are effective only during a war in which the U.S. is a declared neutral, while others are in full force and effect at all times. See 18 U.S.C. 956-968; 22 U.S.C. 441-457, 461-465.

Impact of the United Nations Charter Regime on the Law of Neutrality

In the event of any threat to or breach of international peace and security, the United Nations Security Council may call for action under Articles 39 through 42 of the UN Charter. In particular, the Security Council may make recommendations, call for employment of measures short of force, or order forcible action to maintain or restore international peace and security.

For a nation that is a member of the UN, these provisions of the Charter, if implemented, may qualify that member nation's right to remain neutral in a particular conflict. For example, if a member nation is called on by the Security Council, pursuant to Articles 42 and 43 of the Charter, to join in collective military action against an aggressor state, that member nation loses its *right* to remain neutral. However, the member nation would actually lose its neutral status only if it complied with the Security Council mandate and took hostile action against the aggressor.

COMPLIANCE WITH THE LAW OF WAR

The Role of Protecting Powers and the ICRC

The System of Protecting Powers. Common Articles 8 - 11 of the Geneva Conventions of 1949⁴ provide for application of the Conventions in time of international armed conflict "with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict." The diplomatic institution of protecting powers, which developed over the centuries independent of the Law of War, enables a neutral sovereign state, through its designated diplomatic representatives, to safeguard the interests of a second state in the territory of a third state. Such activities in wartime were first given formal recognition in the Geneva Prisoner of War Convention of 1929.

Such protecting power activities are especially valued when the second and third state do not have effective diplomatic relations, which is traditionally the case in time of war between them. In particular, the protecting power attends to the humanitarian interests of those citizens of the second state who are within the territory and under the control of the third state, such as prisoners of war and civilian detainees.

Protecting power activities reached their zenith during World War II, as the limited number of neutral states acting as protecting powers assumed a role as representatives not merely of particular belligerents, but rather as representatives of the humanitarian interests of the world community. Article 5 of GP I seeks to supplement (not supplant) the protecting power system embodied in the Geneva Conventions by imposing on the parties to the conflict the duty to implement that system from the beginning of the conflict.

The Contributions and Role of the International Committee of the Red Cross (ICRC). Originally formed in 1863, the ICRC is an organization of Swiss citizens that has played a seminal role in the development of humanitarian law applicable in armed conflict. In addition, during World War II, the ICRC supplemented the efforts of the protecting powers, and undertook prodigious efforts on behalf of prisoners of war. Those efforts included the establishment of a Central Prisoner of War Agency with 40 million index cards, the conduct of 11,000 visits to POW camps, and the distribution of 450,000 tons of relief items.

The role of the ICRC as an impartial humanitarian organization is formally recognized in both common articles 9 - 11 of the Geneva Conventions⁵ and in the Protocols. Since World War II, the protecting power system has not been widely used, and the ICRC has stepped into the breach as a substitute for protecting powers in international conflicts, under the auspices of common articles 9 and 10 of the Geneva Conventions⁶ and Articles 5 and 6 of Protocol I.

With respect to non-international conflicts, common article 3 of the Geneva Conventions recognizes the prerogative of the ICRC or other impartial humanitarian organizations to offer its services to the parties to the conflict.

GP II, however, fails to reaffirm this ICRC prerogative and recognizes, in Article 18, only the offer of services by "relief societies located in the territory" of a party to the conflict.

Relations between U.S. Forces and the ICRC

Subject to essential security needs and other reasonable requirements, the ICRC must be permitted to visit PWs and provide them certain types of relief. Typically, the U.S. will invite the ICRC to observe PW conditions as soon as

⁴ Articles 9 - 12 of the GC.

⁵ Articles 10 - 12 of the GC.

⁶ Articles 10 and 11 of the GC.

circumstances permit. Once on the scene, the ICRC will closely examine compliance with the Law of War and, in particular, the Geneva Conventions concerning a broad range of issues.

Given his professional qualifications and specialized training in the Law of War, the judge advocate should serve as the escort and liaison officer with the ICRC.⁷ This role is doctrinal, and stated in FM 71-100-2, INFANTRY DIVISION OPERATIONS TACTICS, TECHNIQUES, AND PROCEDURES, page 6-28. The judge advocate can quickly identify and resolve many Law of War issues before they become a problem for the commander. For those Law of War matters requiring command decision, the judge advocate is best suited to provide advice to the commander and obtain timely responses. These same skills are essential in dealing with ICRC observers. The judge advocate can best serve as the commander's skilled advocate in discussions with the ICRC concerning the Law of War.

Both the commander and the judge advocate should recognize that the ICRC, as an impartial humanitarian organization, is not a political adversary, eagerly watching for and reporting Law of War violations.⁸ Rather, it is capable of providing assistance in a variety of ways. In recent conflicts, the ICRC assisted in making arrangements for the transportation of the remains of dead enemy combatants and for repatriating PWs and civilian detainees. By maintaining a close working relationship with ICRC representatives, the judge advocate receives a two-fold benefit. He is assisted in identifying Law of War issues before they pose problems to the command, and he has access to additional legal resources that may be used to resolve other Law of War matters.

The ICRC is also heavily involved in MOOTW, where it may be present in conjunction with numerous other organizations and agencies. In the former Yugoslavia, Somalia, and Rwanda, for example, many international organizations are or were engaged in "humanitarian relief" activities. Among the most significant is the UN High Commissioner for Refugees (UNHCR). The list of private voluntary organizations (PVOs) and Nongovernment organizations (NGOs) in the field is large; approximately 350 humanitarian relief agencies are registered with the U.S. Agency for International Development (USAID).

REMEDIES FOR VIOLATIONS OF THE LAW OF WAR

U.S. Military and Civilian Criminal Jurisdiction

It is DoD policy that a member of the armed forces who commits an offense that qualifies as a "war crime" will be charged under a specific article of the UCMJ. In the case of other persons subject to trial by general courts-martial for violating the laws of war (UCMJ, art. 18), the charge shall be "Violation of the Laws of War" rather than a specific UCMJ article.

The War Crimes Act of 1997 (18 U.S.C. § 2401) provides federal courts with jurisdiction to prosecute any person inside or outside the U.S. for war crimes where a U.S. national or member of the armed forces is involved as an accused or as a victim.

"War Crimes" are defined in the War Crimes Act as (1) grave breaches as defined in the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party; (2) violations of Articles 23, 25, 27, 28 of the Annex to the Hague Convention IV; (3) violations of Common Article 3 of the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party and deals with a non-international armed conflict; (4) violations of provisions of Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps & Other devices (Protocol II as amended May, 1996) when the U.S. is a party to such Protocol and the violation willfully kills or causes serious injury to civilians.

U.S. policy on application of the Law of War is stated in DoD Directive 5100.77 (DoD Law of War Program) and further explained in CJCSI 5810.01 (12 Aug 96) (Implementation of the DoD Law of War Program). Except when

⁷ General Prugh (former TJAG) fulfilled the task of "interfacing" with the ICRC when he was the legal advisor to CDR, MACV in Vietnam. General Prugh relates that during the early stages of Viet Nam, OTJAG concluded that the U.S. was involved in an Art 3, not Art 2, conflict. In June '65 the situation had changed, and by Aug '65 a formal announcement was made that Art 2 now applied. Soon, ICRC delegates began to arrive, and it fell upon the judge advocates to meet with the delegates. This role continued in operations in Grenada, Panama, Somalia, Haiti, and during the Gulf War. The development of this liaison role was also apparent in Haiti, particularly in the operation of Joint Detention Facility.

⁸ It is essential to understand the neutrality principle of the ICRC. One must stay at arm's length from the delegates so not to risk harming their relationships with the enemy. For example, ICRC personnel will meet with prisoners in private.

properly determined by the National Command Authority that it is not applicable, DoD Components “will comply with the Law of War in the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized...” The CJCS SROE state that, “U.S. Forces will always comply with the Law of Armed Conflict.”

Command Responsibility. Commanders are legally responsible for war crimes committed by their subordinates when any one of three circumstances applies:

- (1) The commander ordered the commission of the act;
 - (2) The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it;
- or
- (3) The commander should have known, “through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof.” (FM 27-10, para. 501).

Judge advocates must keep their commanders informed of their responsibilities concerning the investigation and prosecution of war crimes. The commander must also be aware of his potential responsibility for war crimes committed by his subordinates. CJCSI 5810.01A requires that legal advisers review all operation plans, concept plans, ROE, execute orders, deployment orders, policies and directives to ensure compliance with the instruction, the DoD Law of War Program, “as well as domestic and international law.” The CJCSI also requires integrating the reporting and investigative requirement of the DoD Law of War Program into all appropriate policies, directives, and operation and concept plans.

Investigative Assets. Several assets are available to assist commanders investigating suspected violations of the LOW. Investigations can be conducted with organic assets and legal support, using AR 15-6 or commander’s inquiry procedures. (Command regulations, drafted IAW DoD Directive 5100.77, should prescribe the manner and level of unit investigation.) An investigation may also be conducted by the Criminal Investigation Division Command (CID). CID has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities. The second is when the investigation is directed by HQDA (para. 3-3a(7), AR 195-2).

In addition to CID, and organic assets and legal support, a commander may have Reserve Component JAGSO teams available to assist in the investigation. JAGSO teams perform judge advocate duties related to international law, including the investigation and reporting of violations of the Law of War, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters. Other available investigative assets include the military police, counterintelligence personnel, and judge advocates.

Reports. WHEN IN DOUBT, REPORT. Report a “reportable incident” by the fastest means possible, through command channels, to the responsible CINC. A “reportable incident” is a possible, suspected, or alleged violation of the law of war. The reporting requirement should be stated not only in a “27 series” regulation or legal appendix to an OPLAN or OPORD, but also in the unit TACSOP or FSOP. Normally, an OPREP-3 report established in Joint Pub 1-03.6, JRS, Event/Incident Reports, will be required.

Alleged violations of the law of war, whether committed by or against U.S. or enemy personnel, are to be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

Prevention of War Crimes. Commanders must take steps to ensure that members of their commands do not violate the Law of War. The two principal means of effecting this goal are to recognize the factors which may lead to the commission of war crimes, and to train subordinate commanders and troops to standard concerning compliance with the law of war and proper responses to orders that violate the LOW.

Awareness of the factors that have historically led to the commission of war crimes allows the commander to take preventive action. The following is a list of some of the factors that the commander and the judge advocate should monitor in subordinate units.

- (1) High friendly losses.
- (2) High turnover rate in the chain of command.
- (3) Dehumanization of the enemy (derogatory names or epithets).
- (4) Poorly trained or inexperienced troops.
- (5) The lack of a clearly defined enemy.
- (6) Unclear orders.
- (7) High frustration level among the troops.

Soldiers who receive unclear orders or who receive orders that clearly violate the LOW must understand how to react to such orders. Accordingly, the judge advocate must ensure that soldiers receive instruction in this area. Troops who receive unclear orders must insist on clarification. Normally, the superior issuing the unclear directive will make it clear, when queried, that it was not his intent to commit a war crime. If the superior insists that his illegal order be obeyed, however, the soldier has an affirmative legal obligation to disobey the order and report the incident to the next superior commander, military police, CID, nearest judge advocate, or local inspector general.

International Criminal Tribunals

Violations of the Law of War, as crimes defined by international law, may also be prosecuted under the auspices of international tribunals, such as the Nuremberg, Tokyo, and Manila tribunals established by the Allies to prosecute German and Japanese war criminals after World War II. The formation of the United Nations has also resulted in the exercise of criminal jurisdiction over war crimes by the international community, with the Security Council's creation of the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia.

APPENDIX A

LAW OF WAR CLASS OUTLINE

The topics and order of this outline match the topics and order of presentation of the main chapter

LAW OF WAR

I. LEGAL FRAMEWORK

- A. Customary International Law
- B. Hague Conventions
- C. Geneva Conventions of 1949
- D. Geneva Protocols I and II of 1977
- E. Treaties
- F. Regulations

II. THE PRINCIPLES

- A. **Military Necessity**: targeting not prohibited by LOW and of a military advantage. **Military Objective**: persons, places, or objects that make an effective contribution to military action.
- B. **Humanity or Unnecessary Suffering**: minimize unnecessary suffering - incidental injury to people and collateral damage to property.
- C. **Proportionality**: loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.
- D. **Discrimination or Distinction**: Discriminate or distinguish between **combatants** and **non-combatants**; military objectives and protected people/protected places.

III. TARGETS

- A. Persons
 - 1. Combatants
 - a. Lawful Combatants: Geneva Convention Definition
 - (1) Under Responsible Command
 - (2) Distinctive Emblem Recognizable at a Distance

- (3) Carry Arms Openly
 - (4) Abide by the Laws of War
 - b. Geneva Protocol I, Article 44 - Carry Arms Openly In the Attack
 - c. Unlawful Combatants
- 2. Noncombatants
 - a. Civilians
 - b. Out of Combat (hors de combat):
 - (1) Prisoners of War
 - (2) Wounded and Sick in the Field and at Sea
 - (3) Parachutist (as distinguished from paratrooper)
 - c. Medical Personnel
 - (1) Military - Exclusively engaged or auxiliary
 - (2) Civilian - GP I
 - (3) Chaplains
 - (4) Red Cross Societies and Recognized Relief Societies
 - (5) Relief Societies from Neutral Countries
 - (6) Civilian Medical and Religious Personnel
 - d. Cultural Property Protectors
 - e. Journalists
- B. Places
 - 1. Defended Places
 - 2. Undefended Places
 - 3. Natural Environment
 - 4. Protected Areas - hospital zones, safety zones, cultural districts
- C. Property
 - 1. Military Objectives - Military Equipment, Buildings, Factories, Transportation, Communications
 - 2. Protected Property
 - a. Civilian Property

- b. Medical Establishments - Fixed and Mobile Hospitals
 - c. Medical Transport
 - d. Cultural Property - Dedicated to the Arts, Sciences, Religion, Education, History, Charity
- 3. Works and installations containing dangerous forces
- 4. Objects indispensable to the survival of civilians
- D. Protective Emblems
 - 1. Geneva
 - 2. Hague
 - 3. Works and Installations Containing Dangerous Forces

IV. WEAPONS

- A. Legal Review
- B. Small Arms Projectiles
- C. Fragmentation
- D. Landmines and Booby Traps
- E. Incendiaries
- F. Lasers
- G. Chemical Weapons and Riot Control Agents
- H. Herbicides
- I. Biological
- J. Nuclear

V. TACTICS

- A. Psychological Operations
- B. Ruses - Deception
 - 1. Naval Tactics
 - 2. Land Warfare - false armies, equipment, bases
 - 3. Use of Enemy Property
 - a. Uniforms

- b. Colors
 - c. Equipment
- C. Use of Property - Confiscation, Seizure, Requisition, Contribution
- D. Treachery and Perfidy - Feigning and Misuse
 - 1. Wounds or Sickness
 - 2. Surrender or Truce
 - 3. Civilian or Noncombatant Status
 - 4. UN and Neutral Emblems
 - 5. Protective Emblems
 - 6. Distress Signals
 - 7. Booby Traps
- E. Assassination
- F. Espionage
- G. Reprisals
- H. Rules of Engagement

VI. WAR CRIMES

- A. Definition of war crimes
- B. Command responsibility
- C. Investigative Assets
- D. Reports
- E. Prevention of War Crimes
- F. Charging of War Crimes

VII. OTHER LEGAL ISSUES IN ARMED CONFLICT

- A. War Trophies
- B. Interaction with the International Committee of the Red Cross

VIII. CONCLUSION

- A. Principles

- B. Targets
- C. Weapons
- D. Tactics

APPENDIX B

TROOP INFORMATION

I. REASONS TO COMPLY WITH THE LOW—EVEN IF ENEMY DOES NOT

- A. Compliance ends the conflict more quickly. Mistreatment of EPWs may encourage the remaining enemy soldiers to fight harder and resist capture. During Operation DESERT STORM, favorable treatment of Iraqi EPWs by coalition forces helped end the war quickly because reports of such treatment likely encouraged massive surrender by other Iraqi soldiers.
- B. Compliance enhances public support of our military mission; violations of the LOW seriously reduce the support that U.S. soldiers generally receive not only from the U.S. public but also from people in other countries (e.g., reports of misconduct in Vietnam reduced public support of military mission).
- C. Compliance encourages reciprocal conduct by enemy soldiers. Mistreatment of EPWs by our soldiers may encourage enemy soldiers to treat captured U.S. soldiers in the same manner.
- D. Compliance not only accelerates termination of the conflict but it also reduces the waste of our resources in combat and the costs of reconstruction after the conflict ends.
- E. Compliance is required by law. LOW arises in large part from treaties that are part of our national law. Violation of the LOW is a serious crime punishable by death in some cases.

II. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

- A. Carry out all lawful orders promptly and aggressively.
- B. In rare case when an order seems unlawful, don't carry it out right away but don't ignore it either; instead, seek immediate clarification of that order.
 - 1. Soldiers may be held criminally responsible for any unlawful acts that they personally commit in time of war. Since there is no "statute of limitations" on the prosecution of war crimes, soldiers may have to defend themselves many years after the conflict ends.
 - 2. If a soldier is court-martialed for carrying out an unlawful order, that soldier cannot normally defend himself by claiming he was "just following orders." As a result of attending this class and using common sense, soldiers are expected to be able to recognize an unlawful order and take appropriate action.
- C. Know:
 - 1. The Soldier's Rules.
 - 2. Forbidden targets, tactics, and techniques. (See related material above)
 - 3. Rules regarding captured soldiers.
 - 4. Rules for the protection of civilians and private property. (See related material above)
 - 5. Obligations to prevent and report LOW violations.

III. THE SOLDIER'S RULES

- A. Fight only enemy combatants.
- B. Do not harm enemies who surrender—disarm them and turn them over to your superior.
- C. Do not kill or torture EPW.
- D. Collect and care for the wounded, whether friend or foe.
- E. Do not attack medical personnel, facilities, or equipment.
- F. Destroy no more than the mission requires.
- G. Treat all civilians humanely.
- H. Do not steal—respect private property and possessions.
- I. Do your best to prevent violations of the law of war—report all violations to your superior.

IV. RULES REGARDING CAPTURED SOLDIERS

- A. Handling Surrender of Enemy Soldiers.
 - 1. Be cautious, follow unit procedures in allowing enemy soldiers to approach your position and surrender.
 - 2. Waiving white flag may not mean surrender; it may simply mean that the enemy wants a brief cease-fire so they can safely meet with us. Enemy may seek such a meeting to arrange surrender but meeting may also be sought for other reasons (to pass a message from their commander to our headquarters or to arrange removal of wounded from the battlefield).
 - 3. Enemy soldiers must be allowed to surrender if they wish to do so. Any order not to accept surrender is unlawful.
- B. Treatment of Captured Soldiers on Battlefield.
 - 1. Again, follow established unit procedures for the handling of EPWs (recall the “5 Ss” process).
 - 2. Recognize that soldiers have a duty to treat EPWs humanely. The willful killing, torture, or other inhumane treatment of an EPW is a very serious LOW violation—a “grave breach.” Other LOW violations are referred to as “simple breaches.”
 - 3. Note it is also forbidden to take EPWs’ personal property except to safeguard it pending their release or movement elsewhere.
 - 4. In addition, soldiers have certain affirmative duties to protect and otherwise care for EPWs in their custody. Because this is often difficult in combat, must move EPWs to rear as soon as possible.
 - 5. Certain captured enemy personnel are not technically EPWs but are rather referred to as “retained personnel.” Such retained personnel include medical personnel and chaplains.
- C. Your Rights and Responsibilities If Captured.
 - 1. General. Note soldiers’ separate training on Code of Conduct, SERE, etc., provides additional information.

2. Rights as a Prisoner of War (POW). As discussed earlier, war prisoners are entitled to certain protection and other care from their captors. Such care includes food, housing, medical care, mail delivery, and retention of most of your personal property you carried when you were captured. Generally, the POW cannot waive such rights.
3. Responsibilities as a POW.⁹
 - a. POWs must obey reasonable camp regulations.
 - b. Information: if asked, soldier must provide four items of information (name, rank, service number, and DOB). Explain that such information needed by capturing country to fulfill reporting obligations under international law.
 - c. Work. In addition, enlisted POWs may be compelled to work provided the work does not support the enemy's war effort. Also, POW's are entitled to payment for their work. Commissioned officer POWs may volunteer to work, but may not be compelled to do so. NCO POWs may be compelled to perform supervisory work.

V. OBLIGATIONS TO PREVENT AND REPORT LOW VIOLATIONS

- A. Prevention. Soldiers not only must avoid committing LOW violations; they must also attempt to prevent violations of the LOW by others.
- B. Reporting Obligation. Soldiers must promptly report any actual or suspected violations of the LOW to their superiors; if that is not feasible, soldiers report to other appropriate military officers (e.g., IG, Judge Advocate, or Chaplain).

⁹ One attention getter is to have all students pull out their green military ID Card. Note that at the bottom of the front of the card, and at the top of the back of the card, there is reference to the card serving as proper identification for purposes of the Geneva Convention on Prisoners of War.